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NO. 96-15852

[Lodged AUG 19 1996]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL D. JOHNSON and KEVIN WADSWORTH,
Plaintiffs-Appellants,

v.

DAVID KNOWLES, REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY, et al.

Defendants/Appellees

Appeal from the United States District Court
for the Eastern District of California
[Case No. Docket No. CIV-S-95-835 MLS PAN]

The Honorable Milton L. Schwartz
United States District Judge

BRIEF OF AMICUS CURIAE
BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM
[in support of Plaintiffs/Appellants]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF RELATED CASE 1

STATEMENT OF INTEREST 1

ARGUMENT 2

I. STANDARD OF REVIEW 2

II. THE ACTIONS OF THE REPUBLICAN CENTRAL COMMITTEE CONSTITUTE STATE ACTION UNDER THE CIRCUMSTANCES OF THIS CASE 3

III. HOMOSEXUALS ARE A CLASS ENTITLED TO PROTECTION UNDER 42 USC 1985(3) 8

CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES

Azar v. Conley, 456 F2d 1382 (6th Cir. 1972) 12

Bowers v. Hardwick, 478 US 186; 92 L.Ed.2d 140; 106 S.Ct. 2841 (1986) 10, 12

Cameron v. Brock, 473 F2d 608 (6th Cir. 1973) 12

Collins v. Womancare, 878 F2d 1145, 1148 (1989) ... 8

Conley v. Gibson 355 US 41, 45-46 (1957) 3

Dang Vang v. Vang Xiong X. Toyed, 944 F2d 476, 479 (9th Cir. 1991) 3

DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F2d 327 (9th Cir. 1979) 9, 10, 12

Doe v. Commonwealth's Attorney, 403 F.Supp. 1199, 1202 (E.D.Va.1975) 10

Doe v. U.S. Dept. of Justice, 753 F2d 1092, 1104 (1985) 3

Griffin v. Breckenridge, 403 US 88; 29 L.Ed.2d 338; 91 S.Ct. 1790 (1971) .. 13

High Tech. Gays v. Defense Industry Sec. Clearance Off., 895 F2d 563, 574 (9th Cir. 1990) 10, 12

Jackson v. Metro. Edison Co., 419 US 347, 350 (1974) 4

Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F2d 1045, 1050 (1982) 2

Life Insurance Co. of North America v. Reichardt, 591 F2d 499 (9th Cir. 1979) 9, 12

Means v. Wilson, 522 F2d 833 (8th Cir. 1975) . . . 12-14

Neitzke v. Williams, 490 US 319, 109 S.Ct. 1827, 1833 (1989) 7

NL Industries, Inc. v. Kaplan, 792 F2d, 896, 898 (1986) 3

Romer v. Evans, 517 US ___; 134 L.Ed.2d 855; 116 S.Ct.___ (1996) 11-14

Russell v. Landrieu, 621 F2d 1037, 1039 (1980) 3

United States v. Redwood City, 640 F2d 963, 966 (1981) 2

CALIFORNIA CASES

Malone v. Superior Court, 40 C2d 546; 254 P2d 517 (1953) 6, 8

Moore v. Panish, 32 C3d 535, 545; 186 CalRptr 475; 652 P2d 32 (1982) 5, 6

FEDERAL STATUTES

42 USC § 1983 . . . . . 3, 8, 14

42 USC § 1985(3) 8, 9, 12-14

CALIFORNIA STATUTES

Election Code § 6402 . . . . . 5, 6

Election Code § 7404(b) 5

Election Code § 7411 . . . . . 7, 8, 13

Election Code § 7413 . . . . . 7, 8, 13

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(6) 2, 7, 14

STATEMENT OF RELATED CASE

Amicus Curiae, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM ("BALIF") is not aware of any case pending or previously filed in this Court that is related to the above-entitled matter.

STATEMENT OF INTEREST

BALIF is a minority bar association comprised of over 500 lesbian, gay and bisexual members of the Bay Area legal community. Founded in 1980, BALIF promotes the professional interests of its members and the legal interests of the gay, lesbian and bisexual community at large. As part of that mission, BALIF actively participates in public policy debates concerning the rights of lesbians, gay men and bisexuals.

BALIF frequently appears as amicus curiae in cases where it can provide perspective and argument that will inform a court's decision on a matter of broad public importance. BALIF believes this to be such a case. The rights, and indeed the responsibilities, of gay men, lesbians and bisexuals to be involved in all levels of the political process can only be realized if there is *access* to all levels of that process. This case involves this seminal issue.

As appellants have elaborated on the facts in great detail, this brief alludes only to the facts related to the issues discussed herein.

ARGUMENT

I. STANDARD OF REVIEW

BALIF notes at the outset that the Court was ruling upon a FRCP Rule 12(b) motion to dismiss, which is reviewed *de novo* in this Court. This Court has held that a dismissal under FRCP 12(b)(6) is only proper **in extraordinary cases**. United States v. Redwood City, 640 F2d 963, 966 (1981) [emphasis added]. Generally, the motion to dismiss for failure to state a claim is **viewed with disfavor** and is rarely granted. Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F2d 1045, 1050 (1982) [emphasis added].

The district court, when ruling on the motion, must construe the complaint in the light **most favorable to the plaintiff**. Russell v. Landrieu, 621 F2d 1037, 1039 (1980) [emphasis added]. "A complaint cannot be dismissed for failure to state a claim **unless it appears beyond doubt** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson 355 US 41, 45-46 (1957) [emphasis added]. The court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. NL Industries, Inc. v. Kaplan, 792 F2d, 896, 898 (1986).

It need not appear that plaintiff can obtain the **specific relief demanded** as long as the court can ascertain from the face of the complaint **that some relief can be granted**. Doe v. U.S. Dept. of Justice, 753 F2d 1092, 1104 (1985) [emphasis added].

I. THE ACTIONS OF THE REPUBLICAN CENTRAL COMMITTEE CONSTITUTE STATE ACTION UNDER THE CIRCUMSTANCES OF THIS CASE

The district court ruled that to state a claim under 42 USC § 1983, the plaintiffs must show that the defendants acted under color of state law. [Plaintiffs Excerpts, ER38, Transcript of Hearing before the Honorable Milton L. Schwartz, February 16, 1996 (the "Feb. Trnscpt"), p.3, lines 4-8]. The Court cited Dang Vang v. Vang Xiong X. Toyed, 944 F2d 476, 479 (9th Cir. 1991), noting that: "A person acts under color of state law when exercising or purporting to exercise power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." [Feb.Trnscpt., p.5, lines 15-20].

The Court made the following findings and ruling with reference to Assemblyman Knowles' membership on the Republican Central Committee of El Dorado County [in pertinent part]:

> The Court has examined all of the allegations of the first amended complaint regarding the conduct of Knowles and finds that plaintiffs have not cured the deficiencies of their original complaint. First, **plaintiffs read too much into the designation of Knowles as an ex officio member of the Committee and his power to appoint an alternate member of the Committee.** Knowles obtained his position as an ex officio member on the Committee not by virtue of his status as a member of the State Assembly, but by virtue of his status as a party nominee for this position. See Califor-

> nia Elections Code § 7404 (West 1996 Special Pamphlet). **He does not have to be an incumbent officeholder to retain his membership on the Committee.** . . .
>
> Second, the additional factual allegations contained in the first amended complaint that involve any connection to Knowles position as an Assembly member are that he permits the Committee to use his legislative office to conduct its meetings and that on the official time and expense of the California State Assembly **he directed or influenced** Laveta Stelzmiller and Becker (his former legislative aide) to vote against Wadsworth's draft platform and **to bring about Johnson's and Wadsworth's ouster**. These allegations, together with the fact that Knowles may appoint an alternate member of the Committee, are simply not enough to support plaintiffs' contention that Knowles was abusing his position as an Assembly member by engaging in the conduct complained of...

[Plaintiffs' Excerpts, ER38, Feb.Trnscpt., p.6, line 10-p.7, line 22]

As to the Committee itself, the Court held that pursuant to Jackson v. Metro. Edison Co., 419 US 347, 350 (1974), neither the Committee nor its members were public officers.

First: It should be noted that the Court was incorrect in holding that Knowles ex officio position was not dependent upon him being an elected official. Election

Code § 7404(b) provides that if the party's nominee received less votes for the particular office (in this case, the Assembly) than a write-in candidate, and the write-in candidate was elected, than the elected write-in candidate is the ex officio member of the committee, in place of the original nominee. In other words, the position is not a private position, but a position created for an "elected" member of the Republican Party. It is only open to the nominee when a non-Republican holds the particular elected office. Consequently, although Knowles obtained his position as a nominee[1], he could not keep his position if a Republican Assemblyperson from his district had been elected instead of Knowles himself. This "elected" assemblyperson would have the *ex officio* position in place of Knowles.

Second: Membership on the Central Committee should be considered a public office for purposes of determining whether the Committee is acting under color of state law. Although the California Supreme Court has held that Central Committee membership does not typically constitute a public office, the Court has held that there may be some purposes for which membership is a public office.

In Moore v. Panish, 32 C3d 535, 545; 186 CalRptr 475; 652 P2d 32 (1982), the question was whether former Election Code Section 6402, which prohibited dual candidacy for public offices, would bar a member of a Central Committee from simultaneously running for another public

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[1]It should also be noted that even the status of "nominee" is the result of a public vote. The nominee of the Party for the Assembly is the winner of a public primary in which said person was listed on a state ballot, in a primary conducted by the state, whose results were certified by the California Secretary of State.

office. The Supreme Court determined that it was permissible to hold both offices because the Committee membership was not a public office for purposes of Section 6402, however the holding included the following caveat:

> We are not unmindful that the federal courts have viewed certain racially discriminatory activities of political parties as state action which violated constitutional guarantees. Even in these cases, however, the courts have refused to characterize political parties as public organizations, but have focused instead **on the impact of party primaries and membership rules on the effective exercise of the right to vote**. . . . We hold that the prohibition of dual candidacy contained in section 6402, subdivision (b) does not apply to the selection of member to party county central committees, **but express no opinion of whether party offices might be considered public for some other purposes.**

[Moore, 32 C3d at 545, fn.10 (emphasis added)]

Third: The California Supreme Court has also held that the fact that the courts usually will not interfere with the affairs of political committees does not render such committees immune from all court action. In Malone v. Superior Court, 40 C2d 546; 254 P2d 517 (1953) the Court held as follows:

> The prospective witnesses contend, however, that courts will not interfere with the affairs of political parties or committees

> and hence applicant could have no cause of action. . . .*Where, however, statutes conferring legal rights on members of a political party have been passed*, **the courts have the right to ascertain whether those rights have been violated and the decision of a party tribunal on such a question is of no binding effect**. Moreover, if primary elections have been established by law, a candidate cannot be divested by a political organization [of] rights derived from such election, the question being no longer solely a political one, but one of law of which the courts *must* take cognizance. **The same is true with respect to the rights of members of a party committee elected at a primary election conducted under public authority**. . . . Certainly where **civil and property rights** rather than politics and political dogma are involved, the courts will protect them.

[Malone, 40 C2d at 551 (emphasis added; citations and interior quotes omitted)].

Appellants WADSWORTH and JOHNSON were "members of a party committee elected at a primary election conducted under public authority." Certainly one of their rights, as members of the committee, was the right not to be removed from the committee **in violation of statute**. Election Code § 7411 and Election Code § 7413 enumerate the grounds for the removal of an elected member of the committee.

Election Code § 7411 provides:

> Any member of a committee, **other than an ex officio member,** who misses four regularly called meetings within one 12-month period shall be removed from the committee concerned, unless his or her absence is caused by illness or temporary absence from the county on the date of the meeting.

Election Code § 7413 provides:

> A committee may remove any member, other than an ex officio member, who during his or her term of membership affiliates with, or registers as a member of another party, who publicly advocates that the voters should not vote for the nominee of this party for any office, or who gives support or avows a preference for a candidate of another party or candidate who is opposed to a candidate nominated by this party.

The complaint alleges that the Appellants were not removed from the Committee for any of the above reasons, but because they were homosexuals. The district court should have accepted this allegation as true since it was ruling on a Rule 12(b)(6) motion to dismiss.[2] Removal

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[2]The U.S. Supreme Court has held that the sole issue raised by a Rule 12(b)(6) motion is whether the facts pleaded would, if established, support a valid claim for relief. Thus, no matter how improbable the facts alleged are, **they must be accepted as true** for purposes of the motion. Neitzke v. Williams, 490 US 319, 109 S.Ct. 1827, 1833 (1989).

from elected office on the basis of sexual orientation is not included in the grounds for removals specified in either § 7411 or § 7413, and plaintiffs' right to keep their elected office, except for the grounds specified in §§ 7411 and 7413, is a protectible statutory interest amenable to court review pursuant to Malone.

It should also be noted that the grounds for removal delineated in Sections 7411 and 7413 are not applicable to *ex officio* committee members, such as Assemblyman Knowles. This further demonstrates that the *ex officio* position reserved for the elected state official is significantly different than the position held by a person elected as a committeeperson.

The allegations of the complaint are that KNOWLES, who holds his seat at this time **solely because he is the elected Republican Assemblyman from his district**, actively participated, and in fact instigated, the removal of plaintiffs from the Central Committee (in violation of plaintiffs' statutory and constitutional rights), in concert with other committee members. This satisfies the "joint action" test as enunciated by the Court [Plaintiffs Excerpts, ER27, p.9] pursuant to Collins v. Womancare, 878 F2d 1145, 1148 (1989), for determining whether actions have occurred under color of state law vis-a-vis violations of 42 USC § 1983.

[However, even if it were appropriate for the District Court to treat this matter as a summary judgment motion, it would still have to be denied, because the defendants' claim that plaintiffs were actually removed for renting their establishment to a democrat for a fundraiser, and not because they were homosexuals, clearly raises a question of fact. Plaintiffs claim they took no part in the fundraiser, and did not endorse the candidate, but held there premises out for rent to members of the public, and this was just a business transaction.]

II. HOMOSEXUALS ARE A CLASS ENTITLED TO PROTECTION UNDER 42 USC 1985(3)

Plaintiffs' claim for relief under 42 USC § 1985(3) were dismissed by the Court without leave to amend [Plaintiffs' Excerpts, ER26, p.26, lines 22-24]. The District Court held that:

> To state a claim under Section 1985(3) a plaintiff must allege: (1) a conspiracy; (2) to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; (3) an act by one of the conspirators in furtherance of the conspiracy; and (4) personal injury, property damage or deprivation or any right or privilege of a citizen of the United States. . . .
>
> Homosexuals are not a, quote, "class," unquote, within the meaning of 1985(3) . . .
>
> [Plaintiffs' Excerpts, ER26, p.24, line 21-p.25, line 8]

The District Court cited DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F2d 327 (9th Cir. 1979) for the proposition that homosexuals were not an appropriate "class." The DeSantis Court held that while the forerunner of Section 1985(3) was originally intended "to provide special federal assistance to southern blacks and their allies in protecting their rights under the fourteenth amendment and other reconstruction legislation against the Ku Klux Klan and others" later Supreme Court jurisprudence held that § 1985(3) applied "only when there is 'some racial, or

perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" DeSantis, 608 F2d at 332.

The DeSantis plaintiffs had cited the Ninth Circuit's ruling in Life Insurance Co. of North America v. Reichardt, 591 F2d 499 (9th Cir. 1979) as extending the protection of § 1985(3) to women, and therefore extrapolated that it could be extended to homosexuals as well. The DeSantis court disagreed, holding that:

> . . . While § 1985(3) has been liberated from the now anachronistic historical circumstances of reconstruction America, we may not uproot § 1985(3) from the principle underlying its adoption: The Governmental determination that some groups require and warrant special federal assistance in protecting their civil rights. This underlying principle must continue to determine the coverage of § 1985(3).
>
> . . . it cannot be said that homosexuals have been afforded special federal assistance in protecting their civil rights. The courts have not designated homosexuals a "suspect" or "quasi-suspect" classification so as to require more exacting scrutiny of classifications involving homosexuals.
>
> [DeSantis, 608 F2d at 333]

The "classification" language in DeSantis was based on the holding in Doe v. Commonwealth's Attorney, 403 F.Supp. 1199, 1202 (E.D.Va.1975), which upheld a consti-

tutional challenge to Virginia sodomy laws. This case was cited when a similar issue, involving Georgia sodomy laws, subsequently came before the U.S. Supreme Court in Bowers v. Hardwick, 478 US 186; 92 L.Ed.2d 140; 106 S.Ct. 2841 (1986). In Bowers, the Court held that the issue being decided was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy" which would invalidate many State laws to the contrary [Bowers, 92 L.Ed.2d at 145].

In the instant case, the district court also cited High Tech. Gays v. Defense Industry Sec. Clearance Off., 895 F2d 563, 574 (9th Cir. 1990) as a basis for the proposition that homosexuals do not constitute a suspect class [Plaintiffs' Excerpts, ER26, p.22, lines 20-25]. However, the basis for the decision in High Tech. Gays was also Bowers (see High Tech. Gays, 895 F2d at 571).

At this juncture, it is important to note what Bowers *did not* decide. Bowers *did not* address the issue of whether homosexuals, as a class, were entitled to equal protection under the constitution. The Court specifically noted that the "Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment." [Bowers, 92 L.Ed.2d at 149, fn.8]. This issue was left for another case.

That **other** case, which was recently decided, is Romer v. Evans, 517 US ___; 134 L.Ed.2d 855; 116 S.Ct.___ (1996). In Romer, the Supreme Court invalidated a Colorado amendment, Amendment 2, that repealed various statutes, regulations, ordinances and policies of state and local entities that barred discrimination based upon sexual orientation. Romer, 134 L.Ed.2d at 862. The Romer Court noted that:

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.
>
> . . . We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.
>
> **Amendment 2 fails, indeed defies, even this conventional inquiry.** First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward **the class** that it affects; it lacks a rational to legitimate state interests.

[Romer, 134 L.Ed.2d 865-866 (emphasis added)]

The Court further held that:

> Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons

by a single trait and then denies them protection across the board. The resultant disqualification of **a class of persons** from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . .[¶]Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. . . . Respect for this principle explains why laws singling out **a certain class of citizens** for disfavored legal status or general hardships is rare. A law declaring that in general it shall be more difficult for one group of citizens to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. **The guaranty of equal protection of the laws is a pledge of the protection of equal laws.**

[Romer, 134 L.Ed.2d 866-867 (emphasis added)]

Romer has been cited at length for two reasons:

(1) to demonstrate that the Supreme Court has held that homosexuals may be considered a discrete class of individuals under the law (whether suspect or not); and

(2) to demonstrate that Bowers, and its progeny and predecessors, do not bar homosexuals, as a class, from entitlement to

equal protection of the laws.

This suggests that, in this case, the district court's reliance on both DeSantis and High Tech. Gays was misplaced. It should be noted that other courts have not construed 42 USC §1985(3) as protecting only racial or suspect classifications. As this Court noted in Reichardt (*supra*):

> Courts construing § 1985(3) have not limited its protection to racial or otherwise suspect classifications. Means v. Wilson, 522 F2d 833 (8th Cir. 1975)(political opponents are a sufficient class); Cameron v. Brock, 473 F2d 608 (6th Cir. 1973)(supporters of a political candidate are a sufficient class); Azar v. Conley, 456 F2d 1382 (6th Cir. 1972)(a single family is a sufficient class). Reichardt's allegation that an invidiously discriminatory animus was the motivating force behind the disparate policy terms offered to women is thus **sufficient to survive a motion to dismiss for failure to state a claim.**
>
> [Reichardt, 591 F2d at 505 (emphasis added)]

So, too, should the claims of the plaintiffs in this action, that their expulsion from their duly elected offices on the Central Committee was based upon their status as members of disfavored class, have been sufficient to survive a motion to dismiss for failure to state a claim. This is especially true in light of the fact that the plaintiffs' removal from office violated their right as elected members of the Committee to be removed for only those reasons

cited in Election Code §§ 7411 and 7413.

In the Means case (*supra*), the Eighth Circuit held: "It is thus apparent that the right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by 42 USC § 1985(3). . . . The Sixth Circuit has held, and we agree, that the right to cast a ballot in a state election is also protected from interference from private conspiracies by the federal Constitution." [Means, 522 F2d at 838]. The right to hold office, even a non-public office, as the result of such votes, should be similarly protected.

In Griffin v. Breckenridge, 403 US 88; 29 L.Ed.2d 338; 91 S.Ct. 1790 (1971), the Supreme Court held as follows with reference to the proper interpretation of 42 USC § 1985(3):

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, **must aim at a deprivation of the equal enjoyment of rights secured by the law to all**.
>
> [Griffin, 29 L.Ed.2d at 348]

The plaintiffs alleged that the defendants wanted to remove them from their elected post on the Central Committee because they were homosexuals. This motivation is clearly a "class-based" invidiously discriminatory animus.

The District Court's only justification for dismissing plaintiffs' § 1985(3) claim was its finding that homosexuals were not a proper class. There should be no doubt, following Romer, that homosexuals are an identifiable class entitled to equal protection. This Court should, therefore, reinstate plaintiffs' § 1985(3) claim.

CONCLUSION

Since Assemblyman Knowles *ex officio* position on the Central Committee can only be held by an elected Republican official when one holds that office, it is a sufficiently public office to satisfy § 1983's requirement of state action via the joint action exception. Homosexuals are a sufficiently identifiable class, at least on par with the political class identified in Means, to bar dismissal of a § 1985(3) claim on a Rule 12(b)(6) motion to dismiss. This Court should, therefore, reverse the ruling of the District Court on these two issues.

Respectfully submitted,
Dated: August 19, 1996

/s/

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